# Petition

81-443

Office-Supreme Court, U.S.
FILED
AUG 20 1981
ALEXANDER L. STEVAS,
CLERK

No.

# In the Supreme Court of the United States
OCTOBER TERM, 1981

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JAMES H. NICHOLLS, PETITIONER,

vs.

ERNEST C. NASH, "JANE DOE" NASH AND JOSEPH CHACHKIN, RESPONDENTS.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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(202 - 737 1133)
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## QUESTIONS PRESENTED FOR REVIEW

* Is the U.S. Constitution still the Supreme Law of the Land

* Did the U.S. Supreme Court in creating the doctrine of "absolute immunity" (Butz v. Economow - 438 U.S. 478 (1978) )in reality create an unconditional absolute immunity or was it conditioned upon the "restraints" and "safeguards" imposed by the Court in the body of the decision

* Is the doctrine of absolute judicial immunity substantiated by the U.S. Constitution

* Was Examiner Nash acting "within the course and scope of his judicial duties" during the KAYE hearings

* Can an Administrative Law Judge be held accountable where it is clear that the Petitioner has been damaged

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The petitioner, James H. Nicholls, respectfully prays that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals for the Ninth Circuit entered in this case on May 22, 1981.

## OPINIONS BELOW

The Judgment and Commitment of the United States District Court for the Western District of Washington under date of March 5, 1979 is set forth in Appendix A1, 2, 3, and entered under date of May 14, 1979 and set forth under Appendix A4.

## JURISDICTION

The Judgment of the Court of Appeals (App. 5, 6) was filed on March 25, 1981. The order of the Court of Appeals denying petitioner's timely filed petition for re-hearing was entered on May 22, 1981 (App.7). The jurisdiction of the Court is invoked under Title 28, United States Code 1254 (1)

## STATEMENT OF THE CASE

Inasmuch as Plaintiff-Appellant's suit is the result of being deprived of certain Constitutional rights in a Federal Communications Commission (hereinafter referred to as the FCC) proceeding it seems only right and proper that a brief background to and outline of said proceeding and events leading up to and including this case be set forth.

### BACKGROUND TO THE FCC HEARING

Jim Nicholls, the Plaintiff, became an ordained Minister of the Gospel in 1944. He is among those who are of the Bible-believing, fundamental persuasion. He is Pentecostal.

In June of 1965, Nicholls became general manager of Radio Station KAYE, located in Puyallup (a suburb of Tacoma and approximately twenty-six miles from Seattle) Washington. In August of the

same year, Nicholls signed an option to buy the station. He put together a Washington State corporation called KAYE Broadcasters, Inc., and in September of the same year, finalized the purchase arrangements for KAYE subject to the approval of the FCC. Upon receiving said approval KAYE Broadcasters Inc. became owner/operators of Radio Station KAYE on March 27, 1966. Nicholls was President of the corporation and continued to serve as general manager of the station.

The station had been in operation for many years but had very few listeners. Nicholls, because of his unusual combination of being a clergyman and a news commentator, hosted a daily devotional program as well as a daily talk show. This, coupled with numerous guests, interviews, on-the-spot broadcasting of civic and public hearings soon produced a large

listening audience. (Pulse listed KAYE in second place in a 35-station market survey during part of Nicholls' talk show.) Nicholls believed that one of the greatest needs in any community was communication. As a result of extensive survey, and his experience in meeting and dealing with the public, Nicholls had come to believe that many of the problems in families, communities, states and countries are caused by a lack of communication. He contended that the public had the right to know, the right to be informed, the right to hear for themselves, and to draw their own conclusions. Based on this philosophy Nicholls launched what he called an "experiment in communicating". He brought to his listeners the coverage of entire public hearings, City of Tacoma council meetings, etc., and gave listeners an opportunity to call in to the talk shows later and discuss

the pros and cons of such news happenings.

No radio station regardless of its format enjoys 100% of community support. KAYE was no exception. From 1966 through 1968 false and fraudulent complaints that were nothing more than a figment of someone's imagination, were filed with the FCC. (CR.11, P.7, outlines three such complaints.) App. A9 In March of 1967 a small group identifying themselves as being associated with the League of Women Voters engaged in threatened boycotts against Nicholls'advertisers. This resulted in over 50% of these businesses being sufficiently intimidated to drop their advertising with Nicholls and/or radio station KAYE (1)

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1. The U.S. Senate were considering a resolution to grant Russia more Consul offices in the United States. Nicholls took a survey which showed the American public to be strongly opposed to it.

Senator Carl Muntz on the Senate floor described the survey as being the only one taken in America showing the thinking of the American public. (Congressional Records, March 17, 1967.) Senator Muntz called direct from Washington, D.C. to KAYE and was put on the air "live". He expressed his thanks for the information which KAYE had provided to him, and told what he had done with it, and the influence it had. It was his firm belief that had he had the information sooner, the end result would have been different. (They were only three votes short of defeating the resolution.) He felt this showed the value of "one small radio station" and what it could do to aid America. The boycott of Nicholls' advertisers took place as a direct result of publicizing this survey and Senator Muntz's ensuing call. Two of the principal leaders of this boycott became two of the main principals in the Ad Hoc committee known as the Puget Sound Committee for Better Broadcasting (hereinafter referred to as PSC) formed subsequently. (App.A10-11)

Early in 1969, KAYE Broadcasters Inc. had filed it's application for the renewal of it's license of standard broadcast station. (2)

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2. The normal license period is three years, but the Commission's rules provid- for all radio station licenses in the same state to expire at the same time.

In late 1968 and early 1969 persons associated with the Washington State Council of Churches and their Washington State Religious Broadcast Commission, with the expertise and assistance of the United Church of Christ Broadcast Commission (headquartered in New York City, New York) formed an Ad Hoc committee whose sole purpose was to silence Nicholls and KAYE. The United Church of Christ, in a newsrelease stated that they had received funds, by way of grants, from Ford Foundation, the AFL-CIO and the Marshall Field Foundation, to aid them in this (so-called) citizens challenge. (3). This Ad Hoc Committee according to it's own definition is

> "an association of citizens concerned with improving broadcast practices in the Puget Sound area . The conveners of the Committee are the Reverend Paul

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3. Seattle Post Intelligencer - April 30, 1969 = Appendix A8.

> B. Sutley, Associate Minister of the Union Congregational Church, Seattle, Washington, and the Reverend J. Grayley Taylor Executive Director, Religious Broadcasting Commission, Washington State Council of Churches, Seattle Washington. The association has a Tacoma area sub-committee made up of persons within the service area of Radio Station KAYE. The Reverend W.L. Johnson, Minister of Fern Hill United Methodist Church, Tacoma, Washington, and chairman of the Religious Broadcasting Commission is Chairman. Mrs. Lucille Hurst of Tacoma, Washington is Secretary. Mrs. Hurst is a member of the governing boards of the following organizations: Civic Ballet, League of Women Voters, NAACP, Council of Jewish Women and Faith Home. (Attachment A in PSC Petition to Deny) (Excerpt JA. 122).

The PSC numbered 69 individuals in their "Petition to Deny" the renewal of KAYE's license. This number included 13 clergymen associated with the National Council of Churches. (4) Nine months later, the

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4. Nicholls had been invited to debate with Dr. Lemuel Peterson, Executive Secretary of the Seattle National Council of Churches on the subject of Ecumenism

in the First Baptist Church of Tacoma, Washington, in the spring of 1968. Dr. Peterson took the position espoused by the National Council of Churches supporting ecumenism, and Reverend Nicholls took the position opposing it. The National Council of Churches, by and large, follow the modernistic, liberal interpretation of the Holy Scriptures, while Nicholls adheres to the historic (fundamental) interpretation. Nicholls proved himself competent and influential in the debate. It is Nicholls firm belief that the involvement of these clergymen, and other religious leaders, in subsequent events, came about largely as a result of this debate which brought to light the obvious differences of religious beliefs, and resultant differences of political outlooks.

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PSC was jointed in opposing renewal of KAYE's license by the Pacific Northwest Regional Advisory Board of the Anti-Defamation League of B'nai Brith.

A point which should not be overlooked is, included in this PSC group are those who engaged in threatened boycotts against Nicholls' advertisers.

A further point which must not be

overlooked is that for the most part PSC's allegations against KAYE were concerned with broadcasts ofpolitical viewpoints on local government matters which were considered by the PSC members to be diverse to their political and religious. (may we respectfully refer you again to the last sentence of Footnote 4 and also Footnote 1)

THE FCC HEARING PROCEEDINGS

On July 30, 1970, eighteen months after the KAYE renewal application was filed, the Commission designated the application for hearings in Docket No. 18929 on issues dealing principally with the PSC's allegations that the station, and in particular Nicholls' views, violated the Commission's Fairness Doctrine and "personal attack" rules. (5)

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5. The Fairness Doctrine is contained in the Fairness Primer which was adopt-

ed by the Commision July 1, 1964, and released July 6, 1964 (FCC 64-611). It was published in the Federal Register on July 25, 1964. "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance" 29 Fed. Reg. 10415.

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The first hearing was set for November 18, 1970, in Seattle, Washington. The first pre-hearing conference was held September 21, 1970 in Washington, D.C. at the FCC Building. Nicholls was present and represented by Benedict P. Cottone (6). The strong hostility and prejudicial attitude demonstrated by Defendant Nash, who served as Hearing Examiner, soon convinced them that as

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6. Benedict P. Cottone became KAYE and Nicholls attorney in August of 1970. Nicholls had met with Cottone in San Francisco, California, and as a result of the interview engaged his services. Mr. Cottone had been highly recommended to Nicholls by friends. Mr. Cottone had been General Counsel of the FCC for seven and one-half years, having served in that capacity longer than any other person.

Since resigning his position with the FCC he had practiced in Communications Law, having offices at 1730 "M" Street, Washington, D.C. Mr. Cottone, by agreement with Nicholls, engaged Eugene F. Mullin as co-counsel. David Meyers, an attorney in Cottone's office, assisted in the first hearing.

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long as this attitude prevailed

> "there could be no justice. Plaintiff wanted to by-pass the hearings and go directly to Court but was informed he could not until he had exhausted the Administrative system."

During both KAYE hearings, the term used to describe the official title of Defendant Nash was Examiner. The title "Administrative Law Judge" came into being shortly after the second KAYE hearing. Public notice of this was given September 18, 1972. Examiner Nash

> "conducted a tumultous and tyranical hearing at which Nicholls was the principal. Defendant Nash acted in a hostile and antagonistic manner throughout the hearing showing bias, prejudice and an unjudicial temperament. Finally in a fit of anger Defendant (Nash) expelled Cottone

(Nicholls' counsel) from the hearing and from the hearing room. The remainderof the hearing continued with Plaintiff (Nicholls) unrepresented by counsel, then Defendant (Nash) abruptly closed the hearing." without allowing Nicholls or KAYE to present any rebuttal evidence. (CR.1, P.3, L. 8-15) "Defendant Nash violated the Constitutional rights of Plaintiff Nicholls, by not allowing him opportunity to engage other counsel." (CR.1, P.3, L.15-17) (7)

The hearing was closed on December 16, 1970. Defendant Nash denied KAYE's license renewal application. It is interesting the note that this is the first time in FCC hearing history that an attorney was ejected from a hearing.

Nicholls raised the necessary funds, and had his counsel, Cottone, appeal Examiner Nash's initial decision. The FCC heard the oral argument on the appeal on

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7. More complete details of the unjudicial actions by Examiner Nash are set forth in Nicholls' Complaint CR.1, also in CR.14, CR. 15, and CR. 18.

April 18, 1972. Less than three weeks later on May 2, 1972 the Commission overturned Examiner Nash's initial decision and remanded the case back to Examiner Nash "in order to afford licensee a full opportunity to make a rebuttal showing." (FCC 72-385) At the pre-hearing conference held May 17, 1972 Examiner Nash was respectfully requested by Nicholls' and KAYE's counsel to exercise his undoubted power to recuse himself. He refused. Thereafter, on May 17, 1972 KAYE filed a Motion to Disqualify for Bias and Prejudice signed by Nicholls and attorneys Benedict Cottone, Eugene Mullin and David Meyers. Examiner Nash referred the motion to the Commission, and on June 27, 1972 the Commission denied it. (FCC 72-536)

A Petition for Reconsideration was later dismissed onAugust 31, 1972 (FCC-72-749).

The hostility of Examiner Nash toward Nicholls and KAYE's counsel did not diminish but rather seemed to increase with the passing of time. KAYE with Nicholls as principal was set for a second hearing in Puyallup, Washington, to begin on August 16, 1972. In the pre-hearing conference held in Washington, D.C. on August 7, 1972 Examiner Nash accused Nicholls' counsel of "gutter" tactics. Throughout the hearing session August 16 through September 11 1972 Examiner Nash became more and more pronounced in his hostility toward Nicholls' counsel. Many of the sessions began with Examiner Nash reading a vicious insulting diatribe against Cottone from a prepared statement. Defendant Nash harangued, denounced, shouted, threatened, and became visibly angry and emotionally disturbed, even rising from his chair on

occasion and lunging toward Nicholls' counsel. Many of the public who attended these sessions reported to Nicholls that they could not physically take that kind of abuse - it was too nerve-wracking -and thus they would not be able to return to further sessions of the hearing. Defendant Nash relentlessly engaged in daily insults and assaults upon Cottone's integrity and professional competence and repeatedly noted "on the record" untruthful accounts as to what Cottone did.

So great was Defendant Nash's hostility to Nicholls' attorney, that KAYE and Nicholls were deprived of due process under the Fourteenth and Fifth Amendments of the U.S. Constitution, of a fair hearing by an impartial judge or hearing officer. Because of this hostility much of Nicholls evidence was not even allowed to be marked

for identification. Vital evidence was refused because of this continued attitude.

The most revolting and infuriating of all Examiner Nash's accusations to Nicholls' counsel took place on the morning of September 8, 1972 when Examiner Nash began the morning session by reading a prepared statement directed at Cottone using some of the most despicable terms an attorney could be called including calling him a shyster. Examiner Nash, while Nicholls was under cross examination then told Cottone

> "to remain silent and not cause further interruptions under threat that he would be removed from the hearing, consequently Plaintiff (Nicholls) for the most of the morning was deprived of legal counsel." (CR.1, P.3, L. 27-32)

This action on the part of Examiner Nash further deprived Nicholls of due process and the right to Counsel of his choice,

rights and privileges guaranteed under the Fifth and Fourteenth Amendments of the U.S. Constitution. When Nicholls' counsel finally attempted to make a point of order he was ejected from the hearing. It is again interesting to note that this is the only time in FCC hearing history that an attorney had been expelled twice from a hearing. Cottone is the first attorney ever to be ejected from an FCC hearing, and the only attorney to be twice ejected.

Nicholls and his counsel were extremely distressed by examiner Nash's actions and believed they were caused by the fact that for reasons unknown to them, Nash had already pre-judged the case and was determined not to renew the KAYE license. This belief became even more assured during the second hearing, and several oral motions were made based on this

conviction. (8)

The real issue during the hearings became Nicholls' and KAYE's attorney, Cottone, rather than whether the charges filed against Nicholls and KAYE were true. This fact was stated by Defendant Nash's own admission

> "The issue, Mr. Cottone, at this stage is your conduct as a counsel in this hearing." (CR.1,P.6,L.13-14)

In an Order to Show Cause adopted by the Commission on March 15, 1974 it was stated that it appeared

> "the entire record of the Proceeding (KAYE) is marred by personal exchanges between Benedict P.Cottone, Esquire, and the presiding officer (Administrative Law Judge Ernest Nash)." (FCC 74-283)

On December 4, 1972 three months after the second hearing was abruptly ended by the expulsion of Nicholls' counsel, Judge

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8. See Footnote 10, Page 23-24

Nash released a 71-page Memorandum Opinion and Order reaffirming his dismissal of KAYE's license renewal application. (FCC 72M-1478) His action was based solely upon "finding"as to Cottone's alleged "misconduct". KAYE appealed, and on April 10, 1974 (released April 18, 1974) the Commission adopted a Memorandum Opinion and Order (FCC 74-375) The FCC set aside Judge Nash's decision of December 4, 1972, removed him from the KAYE case and ordered a third hearing before another Administrative Law Judge, Lenore Ehrig, who scheduled a pre-hearing session for May 13, 1974.

On November 8, 1973 because of the enormous expense involved in two FCC hearings and the appealing of both adverse decision to the FCC (9) and though

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9. The expense of preparation for hearings

of this type are enormous. For the first hearing the cost wos approximately $150,000.00 The first Appeal involved much find of facts and memorandums and the cost was $100,000.00. The second Hearing, and again successful Appeal to the FCC en banc doubled this making the total cost $500,000.00. This amount is more than three times what Nicholls originally paid for the station. May we again respectfully remind the Court of Page 8, Para. 1, re grants received by the PSC.

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though confident of a second reversal, Nicholls found himself in an impossible situation and was forced to sacrifice his stock in KAYE, subject to FCC approval. However, as approval of the stock transfer had not yet been received from the FCC at the time of the May 13, 1974 hearing Nicholls appeared as a 50% stockholder of KAYE and with the written approval of the owner of the remaining 50% stock. After several pre-hearing sessions and exchanges of letters, Judge Ehrig on January 3, 1975 on her own motion indef-

initely suspended all proceedings pending the Commission's action on said motion.

On December 7, 1972 (Several weeks before KAYE's appeal for a second hearing session was filed) Nicholls' counsel wrote to the Federal Communications Bar Association (FCBA) calling their attention to the damage caused him by Judge Nash's actions, publicly condemning and denouncing him for alleged professional misconduct in the two widely publicized decisions which Judge Nash had issued (without any opportunity for Cottone to be heard in defense of such charges in a fair and impartial forum). Cottone urged the FCBA to take appropriate steps looking towards protection of his rights to due process. (10) On December 19, 1972,

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10. On a number of earlier occasions Cottone had protested to Judge Nash and to the FCC against allowing and engaging in public

condemnations of Cottone for his alleged professional misconduct without opportunity for him to defend himself, and for making his (Cottone's) conduct the central issue in his client's case, and had stated his readiness and willingness to face and defend himself against such charges in a separate proceeding before and fair and impartial tribunal. (KAYE Reply to Opposition to Petition for Reconsideration of Denial of Motion to Disqualify Judge Nash for Bias and Prejudice, and also during second hearing session (K.Tr. 3917 -3919)

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FCBA's Executive Committee adopted a resolution in the matter. On December 29 1972 the resolution was transmitted to the (then) FCC Chairman Dean Burch. The Commission, by an Order to Show Cause, adopted March 15, 1974 (FCC 74-283, Docket No. 20293) commenced a Special Hearing Office and Special Trial Staff for supposedly considering the conduct of both Cottone and Nash. The Show Cause Order closed with an order

"The propriety of the conduct of

> Administrative Law Judge Ernest Nash during the adjudicatory hearing proceedings in Docket No. 18929 shall be given further study and shall be the subject of such further orders as the Commission may deem appropriate."

Judge Nash retired on or about July or August of 1976, with CAttone's petition still unacted upon. Ironically, the Commission says in Section 24 of it's decision that Judge Nash is "now beyond the reach of the Commission or the Civil Service Commission". (FCC 77-202)

The foregoing serves as a background for the next startling development.

## SUBSEQUENT EVIDENCE OF JUDGE NASH'S MISCONDUCT

From within the Federal Communication Commission's own family, William Kehoe, Assistant General Counsel of the FCC, because of his conviction of the injustice being done to Cottone, came forward with

a story which was later substantiated by affidavit (May 28, 1975) of frightful misconduct by Administrative Law Judge Nash prior to the second KAYE hearing. This Nicholls refers to in CR.15, P.5 and 6, claiming this affidavit shows

> "that Judge Nash violated the most fundamental canon of judicial conduct by attempting to bring into a case which he was to hear and decide, a prosecutor of his own choice. Worse still, he (Defendant Nash) admitted that his purpose for this was to have the assistance of his selected prosecutor in the scheme to "get" Plaintiff's attorney and to "remove" Plaintiff's attorney from the case. The gross impropriety of such conduct is aggravated by Defendant Nash's representation to Mr. Kehoe that he (Nash) could 'arrange' Mr. Kehoe's assignment to the case. This action on the part of Defendant Nash constituted a breach of the 'independence' and 'separation' of his position. By these acts he stultified his quasi-judicial office by using it for prosecuting purposes; and he revealed that he regarded his function as a Judge to be the same as that of a Prosecutor. (Affidavit filed in FCC Docket #20293) Mr. Kehoe's Affidavit shows gross misconduct by Defendant Nash thus revealing his deep prejudice.
>
> The Commission's General Counsel wh n faced with the impropriety of

Judge Nash's conduct disclosed by Mr. Kehoe's Affidavit professed to be so appalled and regarded a falsely alleged suggestion of a 'cover-up' of such conduct with horror, that he referred the alleged misconduct of the author of the alleged suggestion to the Department of Justice and the Grievance Committee of the District of Columbia Bar.

Mr. Kehoe, in a highly unusual action, has asked Attorney General Griffin Bell to look into possible perjury on the part of an FCC hearing Judge (namely Defendant Nash). (Sworn testimony and other documents are part of Docket #20293 and other records on file at the FCC)

Such action on the part of Defendant Nash did deprive PLaintiff of his Constitutional rights as outlined in Plaintiff's Complaint.

NICHOLLS ACTION IN FEDERAL COURT

Plaintiff is a man dedicated not only to our historic Christian way of life, but, being a naturalized citizen (11), he has taken an oath "to support and uphold the

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11. Nicholls was born in Canada and immigrated to the United States in January of 1960. He was naturalized April 15, 1965 in Yakima, Washington, and took the Oath of Citizenship before three Federal Judges

Constitution of the United States of America, against all enemies both foreign and domestic...so help (him) God". This oath Nicholls did not take lightly or frivolously but it is one which with God's help he intends to keep. Being honestly convinced of deprivation of Constitutional Rights and priveleges, he has taken this Civil Rights Action. Nicholls is a minister of the Gospel, and as such his religious beliefs cause him to believe it would be a sin against God and against his country to drop this matter. Therefore, even though he is not an attorney, and does not have the funds to hire an attorney, he has for conscience sake been forced to act pro se. As the Court has stated, "it is just as important to preserve these rights as it was to create them, if our form of government is to be maintained." (CR.11, P.3, L.6-9)(Boyd v.

State 64 SO,2D 536, 554. (1953).) Our Lord said "Ye shall know the truth and the truth will make you free." (John 8:32).

September 9, 1977 - Nicholls with great fear and uncertainty and because of a lack of funds stepped into an area unfamiliar to him and acting Pro Se filed his Original Complaint (CR.1) against Examiner Ernest Nash for Deprivation of Constitutional Rights and Priveleges. Plaintiff outlined definite and serious charges of Defendant Nash's violation of Plaintiff's Constitutional Rights.

October 13, 1977 - Nash filed Notice of Appearance. (CR.3)

November 3, 1977 - Nicholls amended his Original Complaint (CR.4) to include FCC broadcast bureau attorney, Joseph Chachkin because there was sufficient evidence to believe that there was a conspiracy between Nash and Chachkin. There seemed to

be an exchange of signals and other promptings by Nash to Chachkin during the KAYE hearings which caused Mr. Chachkin to react in certain ways. This point was brought out several times in the hearings and was never denied by the Defendants. Such conspiracy or collusion was fortified in the Plaintiff's mind by happenings during the KAYE hearing of September 8, 1978 (i.e. policeman incident and expulsion of Plaintiff's attorney). Mr. Kehoe's statement further reinforces this belief, as does an FCC Memorandum that Mr. Kehoe refers to in his testimony. Nicholls in this Amended Complaint (CR.4) filed a letter with the FCC which he believed would serve notice on the FCC and would keep the door open (if necessary) and thus protect him from having to fight an "exceeding of the Statute of Limitations" or something of the sort. The Court, without

any oral argument has dismissed this part of the action "for failure to exhaust administrative remedies" (See footnote 9 on page9-10of this statement)

November 18, 1977 - Nicholls filed a Motion to Disqualify Mansfield (Nash's attorney) on Constitutional grounds(CR.6)

January 25, 1978 - Nicholls filed a Motion for Default (CR.8) because 79 days after the U.S. Marshal's office served Mr. Nash and 68 days after service on Mr. Chachkin defendants had not yet filed or served any answer or appearance or raised any objections or point of law or demurrer or otherwise and the time allowed by law for answering had expired. (Cr.11, P.1, L.18 to P.2, Line 8)

January 31, 1978 - Defendants filed Motion for Judgment of Dismissal with supporting brief. (CR.9, CR.10)

Nicholls has filed numerous briefs, honestly trying to obtain justice and have the Supreme Law of the Land, our beloved Constitution, settle the controversy. On February 28, 1979 the District Court without hearing oral argument, dismissed said Complaints (CR.20)without giving any Constitutional support for its decision. It did however, use the Butz v Economow (57 L. Ed. 2d 895, 1978) as the basis for its decision. Such decision in this case has ignored the restraints that the U.S. Supreme Court put on their decision, and also ignored other Constitutional positions. The judge, in dismissing Nicholls' action, has deprived him of "right of redress" (First Amendment), right of Jury Trial, (Seventh Amendment; and Article III, Sec. 2, Para. 3), and other basic rights which give rise to the issues set forth in this Appeal, including that of a fair trial,

for <u>there has been no judgment made on the merits</u>.

Nicholls, believing that justice in America should not be based on dollars and cents nor on clever attempts designed to by-pass the Constitution, and sincerely believing he has suffered wrong, therefore appealed the Lower Courts decision to the Ninth Circuit Court of Appeals, March 25, 1981 after Oral Argument (March 4, 1981) the Ninth Circuit Court of Appeals affirmed the District Court's decision. Nicholls filed a Petition of Reconsideration May 22, 1981. The petition for re-hearing was denied and the suggestion for a re-hearing en banc was rejected. In the Ninth Circuit Court of Appeals/filed March 25, 1981 and Memorandum inserted herein as Appendix A5 and A6 the Court sums up Nicholls position with reference to the Butz v. Economou (438

U.S. 478 (1978).)decision as follows:

> "the Supreme Court relied upon several safeguards built into the process that operate as checks against malicious actions by such officials. The appellant then contends that in this case the Administrative Law Judge strayed from the path mandated by these restraints and thereby lost the cloak of immunity to which he otherwise would be entitled.
>
> We are unable to give such a narrow reading to Butz v. Economou. Under that decision, "absolute immunity" means just what it says."

The Court also recognized an injustice hadbeen done yet offered no remedy. Petitioner therefore, in the interest of justice is appealing to the U.S. Supreme Court for further clarification on the Butz v. Economou decision. If the Court is unable to give a general ruling, they should at least consider this one exceptional case in which the Hearing Examiner (Administrative Law Judge) violated the "restraints" and "safeguards" imposed by the Court.

Here is a case where an Administrative Law Judge

*was twice reversed by the FCC

*was offered numerous opportunities to step aside, yet, despite admitted prejudice in the case, he refused to do so.

*attempted to have the assistant general counsel of the FCC step down into the Broadcast Bureau as an attorney and in essence become the prosecutor.

* despite setting aside every principle of judicial behavior, still feels he has the protection of "absolute immunity".

This cannot go unchallenged! At least in this one case this one man must face up to what he did to another man and face the consequences of his actions.

REASON FOR ALLOWANCE OF THE WRIT

ARGUMENT

I

THE NINTH CIRCUIT COURT BY ITS DECISION HAS RAISED ALL OF THE "QUESTIONS PRESENTED FOR REVIEW" (Page i) WHICH NOW REQUIRES

THIS HONORABLE COURT TO RESOLVE THE CONFLICT WHICH HAS ARISEN

In this case, the Court failed to give sufficient weight tothe conditions on which the "absolute immunity" in the Butz v. Economou, 438 U.S. 478 (1978) is founded. The opinion states that the Court is "unable to give such a narrow reading" to the decision. In this sense the decision is logically inconsistent.

The conditions in Butz v. Economou are questions of fact which cannot be determined on the Appellate level at all. It is not a question of whether the Court wishes to give a broad or narrow interpretation to the conditions, but whether those conditions have been met in the present case, and then, whether the absence of these conditions strip the respondents of their conditional immunity.

Petitioner is at the minimum entitled under Butz v. Economou to an opportunity to prove the acts which, according to his complaint, strip the respondents of immunity. Among these denial of counsel, denial of a fair hearing, conspiracy between respondents for the specific purpose of denying Petitioner his right to an administrative determination.

The Court's opinion of March 25, 1981 creates new law which empties the Butz v. Economou decision of any meaning at all. If the Court's reading of the decision is accurate, persons in the position of the Petitioner are relegated to a position worse than that before the Butz v. Economou decision. The Court here finds that no act by an Administrative Law Ludge or an agency attorney can meet the conditions which would remove their immunity. If this decision is read literally, Butz v.

Economou is reversed. Any claim against an Administrative Law Judge or agency attorney is subject to a motion to dismiss for failure to state a case upon which relief can be granted, no matter what such persons did or failed to do. (For instance, if a Judge, while performing his duties, were to pull a gun and shoot someone, "absolute immunity" would cover him.) This is a broader immunity than existed even at common law.

This is not the holding in Butz v. Economou. Bythe Court's own words, Butz v. Economou sets conditions which underlie immunity. Petitioner simply contends that if Butz v. Ec onomou has any meaning it means that he is entitled to a trial on the issue of immunity and that immunity is not so broad as to allow automatic dismissal at the trial level.

If the words, "'absolute immunity'

means just what it says" (lines 5 and 6, page 2, of U.S. Court of Appeals, Ninth Circuit, March 25, 1981 Memorandum - App. A5-6) then logic demands that the words "subject to these restraints" and "these safeguards" also mean "just what it says".

Further, if the Court's decision is to be based solely on the Butz v. Economou (and disregarding the Constitutional basis which was also presented) it must be point ed out that even the Butz v. Economou decision supports the petitioner's contention.

If the Court is to limit it's decision to Butz v. Economou it is then mandatory upon them to use the entire decision not just two words pulled out of context. These words must be considered in the light of the context. It should also be noted that these two words are part of the same sentence where the phrase "subject to these

restraints" appears. This same sentence begins "We therefore hold". The conjunction"therefore" ties in all that has gone before.

This same paragraph begins with the phrase "In light of these safeguards". If "safeguards" and "restraints" were unnecessary, and if, as the Ninth Circuit Court claims, " 'absolute immunity' means just what it says", then the higher Court would not have placed them there. The decision of the Ninth Circuit Court strips them of their meaning, and this cannot be.

Even though Butz v. Economou is a creation of the Court and not of the Constitution, the higher Court had the wisdom to build into it "safeguards" and "restraints" realizing that such "safeguards" and "restraints" are essential. The very purpose of any law is to provide guidelines and safeguards to protect society

from those who would seek to impose their will over another. It would seem to the Petitioner imperative upon the Ninth Circuit Court to explain why they chose to ignore these phrases in their decision, and specify under what set of circumstances they would apply. Why did the Supreme Court consider them necessary, and the lower Court feel they were meaningless?

Petitioner would point out that by using only two words out of a somewhat lengthy decision upon which to base their decision, the lower Court is the one using a "narrow reading" (Pg. 2, Ln.4, U.S. District Court - March 25, 1981 - App.A.5-6) rather than petitioner.

Certainly a litigant has every justification for being "dissatisfied" (Page 2, Ln. 10, U.S. District Court - MArch 25, 1981 - App. A.5-6) when he has been subjected to such obvious misconduct and

miscarriage of justice on the part of those "performing adjudicatory functions within a federal agency". (Butz v. Economou - 46 LW 4962 Col.2), such as those already outlined in the Complaint and Briefs already filed.

The March 25, 1981 decision actually gives license to flaunt the law. "Absolute immunity means just what it says". An Administrative Law Judge and agency attorney can act in any manner they choose fearing no recrimination. There are no "restraints" or "safeguards" which bind them. They are, in fact, above the law. This is NOT POSSIBLE in America, for even President Nixon found he must abide within the "safeguards" and "restraints" of the law.

II

This case has never been judged on its merit, for the simple reason that the Petitioner, through one guise or another, has never been allowed to present his case, THIS, IN SPITE OF THE FCC ordering Respondent Nash to "afford licensee a full opportunity to make a rebuttal showing" (Page 15, Para. 1 - FCC 72-385). Had Nash followed this clear mandate and allowed Nicholls his "day in court" this matter would have long since been resolved and no doubt would never have reached this Court. Had Nicholls had a fair and unprejudiced hearing, irregardless of its outcome, this case would never have been brought before this Court. The fact remains, irrefutable, that he did not, therefore he had no other option than to follow the course which he has.

The Ninth Circuit Court of Appeals in their March 25, 1981 decision has denied petitioner of "one of the most highly prized rights of man...that the Courts shall be open to every person; that each individual shall have a prompt and certain remedy by due course of law for injuries which he may receive in his person, property, or reputation; that he shall obtain such remedy freely without being obliged to purchase it; and that justice shall be administered without denial, delay, or prejudice." (Corpus Juris Secundum, 16A, Sec. 708)

"This" (Constitutional guaranty providing for open courts and insuring a remedy for injuries to person and property) "is declaratory of fundamental principles. In the light of this guaranty, it is the policy of law as well as the duty and obligation of state to furnish and of the

courts to give every litigant his day in court and a full and ample opportunity to be heard; a litigant does not have day in a court which lacks jurisdiction to render judgment. (C.J.S. Sec. 709 - Footnote 91) (Ga. - Parker & Dunn v. State, 142 S. E. 879, 166 Ga. 256, mandate conformed to 143 S.E. 438, 38 Ga.App. 218)

"The guaranty (of an open court) imposes on the courts the responsibility of administering the law as between litigants and to see that right and justice shall previal." (C.J.S. Sec. 709 - page 1212)

Here, the Courts have failed in this responsibility imposed by Constitutional law, and as a result, Petitioner has seen neither right, nor justice, done to himself or to others (the listening audience of Radio Station KAYE, who have been deprived of the kind of radio they wanted.)

III

The decision rendered by the Ninth Circuit Court of Appeals Memorandum filed March 25, 1981 (App. A5-6) has failed to maintain the stated purpose of the Court as outlined by the U.S. Constitution, "The Judicial Power shall extend to all Cases, in Law and Equity arising under this Constitution, the Laws to the United States..." (Art. III, Sec. 2, CL.1) According to this Court's March 25, 1981 decision failure of an Administrative Law Judge and/or agency attorney to adhere to clearly stated guidelines and/or oath of office, resulting in an injury, no matter how grave, to petitioner or anyone else, would render the Court unable to fulfill it's Constitutional mandate to "extend to all cases" it's "judicial power". The Constitution contains no such exceptions (nor, does Butz v. Economou). For any

Court to thus attempt to negate "the Supreme Law of the Land" is a grave error and completely unacceptable.

> "...It is the duty of all the courts, both state and federal, to uphold and enforce the federal constitution". Footnote 14 "The federal courts have no power to nullify a provision in the Constitution". (C.J.S. Sec.93, P.301) (D.C. Johnson v. M atthew, 182 F. 2d 677, 86 U.S. App. D.C. 376 certiorari denied 71 S. Ct. 65, 340, U.S. 828, 95 L. Ed. 608)
>
> Note 15: "Supreme court is especially charged with the duty of construing and upholding the Constitution, and must be alert to see that a doubtful precedent is not extended by mere analogy to a different case if the result of such extension will be to weaken or subvert what the court conceives to be a principle of fundamental law of the land. (U.S.-Dimick v. Schiedt, Mass., 55 S.Ct. 296, 293, U.S.474, 79 L.Ed.603, 95 A.L.R.1150)

Up to and including this three-judge panel's decision of March 25, 1981, the Constitution has not once been made the basis for any decision. Petitioner cannot understand why. Indeed, the March 25,

1981 decision has ignored, forgotten, or failed to consider, the Constitutional issues Petitioner raised. It is for this very reason that Petitioner filed Complaint under Title 42, Sec. 1983, contending that Constitutional rights and guaranteed had been denied him. The very first issue that Petitioner presented was "Is the Constitution still the Supreme Law of the Land?" The three-judge panel court's decision omitted the Constitution which IS the Supreme Law of the Land from their decision. Indeed their decision has no reference or mention to a gingle Constitutional quote to support their position. (Rather, they lifted a creation of the courts ABOVE the Constitution by referring only to Butz v. Economou!) Petitioner cannot fail to wonder why. These same men have pledged themselves to "support and defend" the Constitution

in their oath of office. How can they justify failing to take that Constitution into consideration in their decisions?

Petitioner holds that the U.S. Constitution IS the Supreme Law of the Land (Art. VI, Sec.2), and as such, it MUST and WILL have the final say in this case.

The decision of the Ninth District Court in their Memorandum of March 25, 1981 fails to maintain the balance of Constitutional protection for the petitioner. Their ruling thus is inconsistent with the Constitution. The Court is saying, "We are sorry, but the Constitution does not apply to your case." And yet, the United States Supreme Court Digest, Lawyer's Edition notes:

> H. "The constitutional guaranty of rights and immunities to the citizen insures to him the privilege of having those rights and immunities judicially declared and protected. Laurence v. State Tax Commission,

286 U.S. 276, 52 S.Ct. 556, 87 A.L.R. 374, 76 LEd. 1102.

E. Rights granted by the Federal Constitution to one person cannot be infringed in order to prevent violation of law by another person. Schlesinger v. Wisconsin 270 U.S. 230, 46 S. Ct. 260, 43 A.L.R. 1224, 70 L.Ed. 557.

C. Constitutional guaranties may not be made to yield to mere convenience. Weaver v. Palmer Bros Co. 270 U.S. 402, 46 S.Ct. 320, 70 L.Ed. 654.

"The Bill of Rights and the procedures it guarantees are not to be abrogated merely because a guilty man may escape prosecution, or for any other expedient reason. Kennedy v. Mindoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed. 2d 644. (Underlining by petitioner for purposes of emphasis)

The March 25, 1981 decision makes the "Oath of Office" meaningless. There is no point in swearing to "uphold and support the Constitution of the United States of America" for, under this decision, it does not apply, thus attempting to invalidate ART.VI, CL.3 of the U.S. Constitution, where it states "...judicial offi-

cers...shall be bound by Oath or Affirmation to support this Constitution;" and "Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

IV

The Ninth Circuit Court Memorandum of March 25, 1981 also omitted to consider petitioners third issue,namely: "Was Examiner Nash acting 'within the course and scope of his judicial duties' during the KAYE hearings?"

The Courts have repeatedly ruled: "There is NO vested right to do wrong."

Freeborn v. Smith 2 Wall 160
17 L.Ed 922

Randall v. Kreiger, 23 Wall 127
27 L.Ed. 124

Persall v. Great Northern R.Co.
161 U.S.646, 16 S.Ct.705
40 L.Ed. 838

Johannessen v. United States
225 U.S. 227, 32 S.Ct.613
56 L.Ed.1096

The Seventh Circuit Court of Appeals has held that a "public official" (and any Judge or Justice IS a public official) does not possess "immunity" simply because he operates in a "discretionary manner". It (Seventh Circuit) indicated that a public servant is to be held liable when he abused his discretion in a way that was arbitrary, fanciful, or clearly unreasonable. (Littleton v. Berling; 468 F02nd 389; CA.7 Ill. 972)

"No court, or legislature, or even Congress has the right or the authority to act in a manner inconsistent with the U.S. Constitution." (Am. Jur. 16-177)

## CONCLUSION

For the foregoing reasons, Petitioner, James H. Nicholls, respectfully urges that this Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be granted to resolve the conflict which has arisen.

Respectfully submitted,

James H. Nicholls
Pro se
1002 National Press Bldg.
Washington, D.C., 20045.
(202) 737-1133

Dated: August 20, 1981

# Appendix

A 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
OFFICE OF THE CLERK
TACOMA, WASHINGTON 98401
(206) 393-6313

March 5, 1979

James H. Nicholls
P.O. Box 823
Puyallup, Wa., 98371

United States Attorney
Attention: Charles F. Mansfield, AUSA
1012 U.S. Courthouse
Seattle, Wa. 98104

Re: C77-168T - Nicholls v Nash

Attached is a photocopy of the Order signed by Judge Manuel Real, U. S. District Judge, Los Angeles, granting defendants' motion to dismiss and denying plaintiff's motion for Order of Default.

JOE R. ROMANE, CLERK

/s/ By
Deputy in Charge,
Tacoma

rf/s
Att.

CR 20

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

| | |
|---|---|
| JAMES H. NICHOLLS,<br>Plaintiff,<br><br>vs<br><br>ERNEST C. NASH,<br>"JANE DOE" NASH and<br>JOSEPH CHACHKIN,<br>Defendants. | C77-168<br><br>(Court Clerk's stamp appears here, dated Mar. 5-1979) |

Defendant moves to dismiss plaintiff's complaint pursuant to Rule 12(b) Federal Rules of Civ. Procedure.

Plaintiff brings an action against defendants, Ernest C. Nash, "Jane Doe" Nash and Joseph Chachkin, for violation of his civil rights during hearings by defendant, Ernest C. Nash, as an Administrative Law Judge for the Federal Communications Commission and Joseph Chachkin, as an attorney of the Federal Communications Commision presenting the matter on behalf of the F.C.C.

Both defendant, Ernest C. Nash and Joseph Chachkin are immune from claimed violations of civil rights arising out of an administrative hearing. Butz v. Economou 57 L.Ed.2d 895 (1978)

No claim is stated against defendant "Jane Doe" Nash.

Only the United States Attorney is authorized to prosecute violations of the criminal laws of the United States. 18 U.S.C. - 1503 gives no private right of action.

Plaintiff's purported claims under the Federal Tort Claims Act are insufficient for failure to exhaust administrative remedies which are a prerequisite to filing action in the United States District court.

The motion to dismiss is granted.

Plaintiff's motion for default is totally without merit and is denied.

Dated: February 28, 1979.

/s/_____
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

JUDGMENT ON DECISION BY THE COURT
CIV 32 (7-63)

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WASHINGTON AT TACOMA

CIVIL ACTION FILE NO.C77-168T

JAMES H. NICHOLLS,
Plaintiff,

vs.

ERNEST C. NASH,
"JANE DOE" NASH, and
JOSEPH CHACHKIN,
Defendants.

JUDGMENT

This action came on for consideration before the Court, Honorable Jack E. Tanner United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged Defendant's Motion to Dismiss is GRANTED: Plaintiff's Motion for Default is DENIED.

Dated at Tacoma, Washington, this 14th day of May, 1979.

(Clerk Court Stamp)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| JAMES H. NICHOLLS, Plaintiff-Appellant v. ERNEST C. NASH, "JANE DOE" NASH, and JOSEPH CHACHKIN, Defendants-Appellees | (Court Clerk stamp dated MAr.25 1981) NO. 79-4431 MEMORANDUM |

Appeal from the United States District Court for the Western District of Washington Argued and Submitted March 4 1981

BEFORE: KENNEDY and BOOCHEVER, Circuit Judges, and GRAY* District Judge

The plaintiff appeals from the judgment of the district court granting a motion to dismiss his action charging violations of his civil rights allegedly committed in the course of a hearing conducted by defendant Nash, an Administrative Law Judge for the Federal Communications Commission, and participated in by defendant Chachkin, as attorney for the FCC. We affirm.

The appellant acknowledges that

Butz v. Economou, 438 U.S. 478 (1978) holds that an Administrative Law Judge that conducts a hearing and the agency attorney that presents evidence are immune from liability for damages growing out of their participation. He points out, however, that in rendering such decision, the Supreme Court relied upon several safeguards built into the process that operate as checks against malicious actions by such officials. The appellant then contends that in this case the Administrative Law Judge strayed from the path mandated by these restraints and thereby lost the cloak of immunity to which he otherwise would be entitled.

We are unable to give such a narrow reading to Butz v. Economou. Under that decision, "absolute immunity" means just what it says. The qualification urged by the appellant would subvert the very

purpose for which the immunity doctrine was established, namely, to free officials in the appropriate categories from the threat and burden of damage suits by dissatisfied litigants.

Although we note with regret the extent to which the appellant has found it necessary to spend his resources in efforts to vindicate his position, we find that he has no justiciable claim.

AFFIRMED.

* Honorable William P. Gray, United States District Judge, Central District of California, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Court Clerk stamp dated May 22, 1981)

JAMES H. NICHOLLS,
Plaintiff-Appellant

v.

ERNEST C. NASH,
"JANE DOE" NASH and
JOSEPH CHACHKIN,
Defendants-Appellees

No. 79-4431

ORDER

Before: KENNEDY and BOOCHEVER, Circuit Judges, and GRAY,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Kennedy and Boochever have voted to reject the suggestion for a rehearing en banc, and Judge Gray has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

* Honorable William P. Gray, United States District Judge for the Central District of California, sitting by designation.

SEATTLE
Post-Intelligencer
THE VOICE OF THE NORTHWEST
43 S Wednesday, April 30, 1969

# Church Fires at Puyallup Station

BY J. MICHAEL KENYON

The United Church of Christ, which has added responsible broadcasting to the vanguard of its awareness, has mailed out a press release detailing the actions of an aroused citizenry in the Tacoma-Puyallup area.

From its Office of Communication in New York, the church - the first big conglomerate in Protestant history - sends word that the ad hoc Puget Sound Committee for Good Broadcasting has filed a petition with the Federal Communicatio n Commission.

The petition, signed in one form or another by 147 persons, asks that FCC license renewal of Radio KAYE in Puyallup be denied.

STICKY BUSINESS

The actions stem from a series of live and taped discussion programs which are or have been part of the menu at KAYE. The station occupies 1450 on the dial and broadcasts with a power of 1,000 kilocycles daytime and 250 kilocycles nighttime. It is not a strong signal. It, however, has posed some weighty questions.

Lest you wonder any longer, this particular story is an involved one. It is sticky business. It is something that involved widely divergent ideas.

In a word, it involves thought - and that's always bound to upset people.

"All this reaction convinces me that something is awfully, awfully wrong.... somewhere," allows James Nicholls, KAYE president and general manager. He is a veteran broadcaster whom, the petition alleges, has devoted a large part of

station time to his own views.

As it also alleges that these are "extremist" views, the United Church of Christ has steered these responsible citizens into the realm of broadcasting's "Fairness Doctrine."

That doctrine, as advanced by the FCC, is a* the liberal, socially-conscious organization that first got into broadcasting's ballgame as an outgrowth of the violet desegregation of the University of Mississippi in 1962.

Not too long after, it opposed the license renewal of WLBT-TV in Jackson,

*rather ambigious, yet morally unapproachable, guideline to determine whether station licensees are handling controversial issues from both sides of the fense. Not necessarily equal time, just fair play.

* The typesetter apparently mixed the lines between these two *.

The United Church of Christ, for background, is Miss., on the grounds the station was systematically suppressing the expression of integrationist views.

The FCC, in subsequent hearings, determined that a few announcers had said the word "nigger," and that "Sorry - CABLE Trouble" sign had flashed on the screen when news arrived that Thurgood Marshall, a Negro, had been appointed to the U.S. Supreme Court.

A massive hassle ensued, even within the confines of the FCC chambers when the commission voted, both in 1964 and again last summer, to renew the station's license. One dissenter, Commissioner Nicholas Johnson cried:

"It would appear that the only way in which members of the public can prevent renewal of an unworthy station's license is to steal the document from the wall of

the station's studio in the dead of the night."

Nevertheless, while renewing WLBT, the FCC did acknowledge the precedent that citizens' groups could, in fact, challenge license renewals. Thus, fuel was heaped upon the United Church of Christ fire.

Additional aid, somewhat in excess of the $85,000.00 from a Marshall Field Foundation grant and AFL-CIO labor money, has spearheaded a number of church look-sees at "responsible broadcasting" around the nation. The labor moguls, of course, became concerned with some allegedly "extremist" viewpoints which were construed to be anti-labor in sentiment.

The petition against KAYE, then is certainly not the end. It is hardly even the beginning.

he had considered the fact that every single complaint had been fraudulent and was nothing more than a figment of someone's imagination. Defendant merely shrugged his shoulders. Plaintiff then proceeded to outline the complaints (activity) that has been on file:

1. Mr. Baker of Institute for American Democracy had filed a complaint with the F.C.C. charging that Plaintiff has carried a Dr. McBernie program on KAYE largely consisting of an attack on the Institute and persons associated with it, that plaintiff had not informed I.A.D. of such attack.

Plaintiff then asked Mr. Chachkin if he considered the fact that this complaint was false because Plaintiff or the station had never carried a Dr. McBernie

program so there couldn't be any truth to the complaint. Mr. Chachkin reply was a simple "No".

2. Plaintiff then informed Defendant Chachkin that a short time later the Institute for American Democracy made another complaint to the F.C.C. of the airing by KAYE of a broadcast by the Church League of America personally attacking that Institute and persons associated with it. Plaintiff then asked Defendant Chachkin if he had considered the fact that this complaint was also a false complaint and was in reality nothing more than a figment of someone's imagination because here again the station had never carried such a broadcast as specified. Defendant Chachkin answered with a simple "No".

3. Then a Mrs. Mable Rupe or Rupe

filed another fictional complaint with the F.C.C. of more vicious personal attacks. This again was false for the guest plaintiff was supposedly interviewing had never appeared on plaintiff's show, nor had he ever been aired on any other program on the station.

Plaintiff then informed defendant Chachkin that though these and other complaints had been filed with the F.C.C., every single complaint had been false, there was absolutely no evidence to support such complaints. When asked why we were put into a hearing,

CONSULAR CONVENTION WITH THE SOVIET UNION

The Senate resumed the consideration of the Consular Convention between the United States of America and the Union of Soviet Socialist Republics, together with a protocol relating thereto, signed at Moscow on June 1, 1964 (Ex. D., 88th Cong., second sess).

Mr. MANSFIELD. Mr. President, I suggest the absence of a quorum, and ask that the time be taken out of both sides.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will call the roll.

Mr. MORTON. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection it is so ordered.

Mr. MUNDT. Mr. President, I yield myself 20 minutes.

The PRESIDING OFFICER. The Senator from South Dakota is recognized for 20 minutes.

Mr. MUNDT. Mr. President, before getting into a discussion of the reservation which is now before us, Executive Reservation No. 1, I should like to read into the RECORD two statements which have come to my office today.

Yesterday, during the colloquy introduced by the Senator from California (MR. MURPHY), during the discussion led by the Senator from Nebraska (MR. HRUSKA), some interested observations were made in connection with the rather surprising fact that none of the national pollsters had taken polls, or at least had not reported them generally in the press, on this very important and difficult question now

before us.

Early last evening I received a telephone call froma Mr. Jim Nicholls, of KDAY, a radio station in Tacoma, Wash., who operates a program called "Partyline." He said that this radio station in the State of Washington had been conducting a poll for several days on this particular topic. I said:

That is interesting. Why don't you send me a telegram and tell me what is in it, and I will be glad to read it into the RECORD?

A telegram from him came this morning. I shall read it into the RECORD. I should add I shall be pleased to place into the RECORD any other authentic polls which can be secured from radio stations, newspapers, or the famous pollsters, George Gallup and Louis Harris, both of whom have apparently overlooked taking a poll in connection with this question, to see how those who are interested have expressed themselves on this subject. I reaffirm what I said yesterday. I think on issues of this kind, when we should hear and heed, as I think we do, the hopes and prayers of people everywhere for an early conclusion of this war, that at least their expressions should be heard by Members of the Senate.

The telegram reads:

Senator Karl Mundt,

The Senate,

Washington, D.C.

In a Phonein writein poll on the Consular Treaty on my radio program covering the greater Tacoma area thirteen hundred ten opposed and one favorable. This sampling appears indicative of how the average citizen feels...

Then follow some compliments about my efforts here, which it might be immodest for me to recite. However, I shall have to put them into the RECORD because they are a part of the telegram, but that part will appear in the RECORD without my reading it.

I ask unanimous consent that the telegram be printed in the RECORD at this point.

There being no objection, the telegram was ordered to be printed in the

RECORD, as follows:

TACOMA, WASH.,
March 14, 1967.

Senator Karl MUNDT,

The Senate,

Washington, D.C.

In a Phoein writein poll on the Consular Treaty on my radio program covering the greater Tacoma area thirteen hundred ten opposed and one favorable. This sampling appears indicative of how the average citizen feels. Many thank God for your courageous leadership in opposing the chief suppliers of arms killing American boys in Viet Nam.

JIM NICHOLLS,
"Partyline," KDAY.